UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS

Case. No. 95-INA-330

Date: October 1, 1997

In the Matter of:

BATAL BUILDERS, INC.,
Employer,

On Behalf of:

TRANSITO ORDONEZ,
Alien.

Before: Burke, Neusner and Vittone,
Administrative Law Judges

DECISION AND ORDER

PER CURIAM

The above entitled action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1995) of the United States Department of Labor Certifying Officer's (CO) denial of alien labor certification. The application for labor certification was submitted by the Employer on behalf of the above named alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182 (a)(5)(A) (1995) ("the Act").

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that, at the time of the application for a visa and admission into the United States where the Alien is to work: 1) that there are not sufficient workers in the United States who are able, willing, qualified, and available; and 2) that the alien's employment will not adversely affect the wages and working conditions of U.S. workers that are similarly employed.

An employer who desires to hire an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage under prevailing conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for Review, as contained in the Appeal File (AF), and any written arguments of the parties. 20 C.F.R. § 656.27 (c).

STATEMENT OF THE CASE

The Employer filed an application for alien labor certification on behalf of the Alien on February 9, 1994, to fill the position of "Carpenter, rough." (AF 18). The duties listed were:

> Working for a residential construction company. Duties involve construction of rough wooden structures for and to support a variety of structures such as sewer supports, concrete foundation, framework to strengthen construction, and other related duties.

(AF 18). The salary offered was $11.17 per hour, with two years of experience required for the position. (AF 18). In addition, applicants were required to be honest, reliable, and dependable. (AF 18).

The CO issued a Notice of Findings (NOF) proposing to deny labor certification for inadequate recruitment efforts. The CO questioned whether the Employer had made sufficient efforts to contact U.S. applicant Mr. Rene Sanchez for the carpentry position. The CO requested that the Employer provide a more complete recruitment report detailing its recruitment efforts, including, inter alia, each recruitment source, the number of U.S. applicants responding to the job posting, the names, addresses, resumes, and applications of the U.S. applicants, and the lawful, job-related reasons for not hiring each U.S. applicant.

The Employer responded to the NOF on September 2, 1994. The Employer stated that the Virginia Employment Commission (VEC) referred three names to the Employer for possible interest in the position. This list included names and addresses of each referral. Employer states that it sent letters by Certified Mail with Return Receipt to the two applicants who initially called Employer about the job opening. Employer's recruitment report then indicates that those two applicants abandoned their interest in the position. Employer contends that Mr. Sanchez never contacted the construction office because company policy was to record all incoming calls on message pads. If the person calling wished to speak to an individual who was not present, a message was written down indicating the date and time of the call, the name of the caller, the person to whom they wished to speak, and the nature of the call.

Employer argues that because it has no record of such a message from Mr. Sanchez, it follows that Mr. Sanchez never contacted Employer regarding the position. The Employer further argues that it was "never provided instructions as to what was expected of [Employer]" with regard to Mr. Sanchez. Employer's argument concludes that because the CO did not prepare the NOF until three months after the end of the recruitment period, any attempt at that point to locate Mr. Sanchez, and advise him of the job opening, would not offset the CO's requirement to prepare the NOF, and advise the Employer of recruitment deficiencies, in a timely manner.

The CO issued a Final Determination (FD) on February 13, 1995, in which he denied labor certification for failure to address recruitment deficiencies listed in the NOF. The Employer filed a timely request for review of the CO's denial of certification on March 6, 1995.

DISCUSSION

The issue in this case is whether the Employer's recruitment effort is sufficient to meet the standard set out in 20 C.F.R. 656.21(j)(1).

20 C.F.R. 656.21(j)(1) requires that the Employer provide a written report of all recruitment efforts during the 30 day recruitment period. Employer argues that it acted in good faith because its report showed that two of the applicants referred by the VEC abandoned their interest in the job, while the third applicant never contacted Employer regarding the position. In contrast to the Employer's argument, the CO's FD clearly states that the third U. S. applicant, Mr. Sanchez, responded to a questionnaire for the local office. Mr. Sanchez stated that he was in touch with the Employer, but was not asked to come in for an interview. Employer's response to this argument is that it has no "phone record" of Mr. Sanchez's call, and thus it is impossible that Mr. Sanchez called at all. Employer further argues that the VEC often gives carpenter applicants several referrals and that Mr. Sanchez is probably confused about which company he contacted. Finally, Employer argues that it is "common knowledge" in the construction industry that interviews are difficult to schedule because of job site locations and that applicants should be aware that "several phone calls" may be necessary in order to schedule an interview.

Employer's arguments are not persuasive. Employer acknowledges that when VEC forwarded the three referrals, it provided the name and current address of each applicant. An employer must make efforts to contact qualified U.S. applicants in a timely fashion after the receipt of referrals from a state job service agency. *Loma Linda Foods, Inc*., 89-INA-289 (Nov. 26, 1991) (*en banc*). Failure to timely contact the U.S. applicants indicates a failure to recruit in good faith. *Id*. In addition, where an employer does not prove that it had no access to addresses or telephone numbers of applicants, the employer cannot refuse to contact applicants because those applicants did not directly contact the employer after referral from a state job agency. *Norwins Corp.*, 90-INA-246 (Sept. 19, 1991).

The Employer's argument that it was "unaware" of what it was supposed to do with the addresses does not alter its responsibility to contact the applicants, including Mr. Sanchez, directly. Therefore, even if Mr. Sanchez never contacted the Employer, as Employer argues, Employer still had the burden of contacting Mr. Sanchez directly through the information provided by the VEC. *Id*. Further, the employer has the burden to make multiple telephone calls in an effort to contact applicants, and must clearly document those efforts. *Domenico Marino*, 94-INA-245 (July 19, 1995); *Coma Unida*, 89-INA-289 (Nov. 26, 1991) (denying certification where Employer failed to contact qualified U.S. applicant in timely fashion); *David Cohen*, 94-INA-555 (Aug. 7, 1995) (upholding denial of labor certification where employer did not meet its burden of contacting applicant directly, and applicant denied ever having heard from employer). Here, Employer's own request for review states that it failed to take any initiative to contact Mr. Sanchez directly. Accordingly, labor certification was properly denied on that ground alone.

In addition, Employer's claim that Mr. Sanchez never contacted its office is contradicted by Mr. Sanchez's response to the local office that he did contact Employer, but was not invited for an interview. Even if the Board did accept Employer's argument regarding the difficulty of scheduling interviews in the construction industry, "confusion created by an employer as to where interviews are to take place...indicates a lack of good faith in the recruiting effort." *Suniland Music Shoppes*, 88-INA-93 (March 20, 1989). Employer's claim that Mr. Sanchez was confused about which company he contacted is pure conjecture. Employer has provided no documentation for its claim other than its statement that Mr. Sanchez, according to his questionnaire, was also referred to other companies. Moreover, Employer cannot substantiate its claim that its lack of a phone message slip corroborates Mr. Sanchez's failure to contact Employer at all. Labor certification is correctly denied where the Employer and the Applicant have conflicting stories regarding timely contact, and the Employer fails adequately to rebut the applicant's version. *California Quick Mart*, 94-INA-430 (Jan. 17, 1996).

Employer's argument that the CO may not raise issues in the FD not previously mentioned in the NOF is similarly unpersuasive. If the NOF provides sufficient notice of the proposed basis for denial, and the Employer fails to rebut those findings, then labor certification is properly denied. *Liason Center of General Chamber of Commerce of the Republic of China*, 90-INA-140 (Apr. 29, 1991). Further, if the Employer addresses the deficient issue in rebuttal, such argument will be considered as evidence that the NOF provided adequate notice of the deficiency. *Anderson-Mraz Design*, 90-INA-142 (May 30, 1991). In the instant case, Employer's rebuttal included a letter dated January 6, 1995, drafted on Employer's Attorneys' letterhead, that clearly states "the major issue that your office mentioned is that the employer had not tried to contact a person who was referred by the VEC." (AF 8). Accordingly, the Employer had clear notice of its deficient recruitment efforts, and its subsequent obligation to contact Mr. Sanchez in order to cure that deficiency. Rather than contact the applicant, however, employer continued to argue that: 1) the Department of Labor had never required them to take such action before; and 2) it remained Mr. Sanchez's responsibility to contact Employer regarding his interest in the position. (AF 8, Request for Review at 1-3).

Employer's arguments are clearly opposite established case law. Whether or not this particular Employer had been required to contact applicants directly in the past does not relieve it of the obligation to contact Mr. Sanchez in this instance. Moreover, the CO's NOF clearly indicated, and Employer's rebuttal clearly recognized, that Employer was required to contact Mr. Sanchez in order to cure its recruitment deficiencies. Employer made a conscious decision not to contact Mr. Sanchez, and instead reiterated the same argument that the CO had already rejected. Employer has thus failed to cure the deficiencies in its recruitment efforts or persuasively rebut the CO's NOF.

ORDER

The certifying officer's denial of labor certification is hereby **AFFIRMED**.

SO ORDERED.

At Washington, D.C.

Entered at the direction on the panel by:

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1)n when full Board consideration is necessary to secure or maintain uniformity in its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.